FILED
JUL 15 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 97-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

NORTHEAST CELLULAR TELEPHONE COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, PORTLAND CELLULAR PARTNERSHIP, SACO RIVER CELLULAR, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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54 pp

STATEMENT REQUIRED BY RULE 29.6

Portland Cellular Partnership ("PortCell") is a general partnership engaged in the cellular radiotelephone business operating in Androscoggin County, Maine. There are three general partners: Lewiston Auburn Cellular, Inc. ("Lewiston"), Seacoast Cellular, Inc. ("Seacoast"), and NYNEX Mobile Communications Company ("NYNEX Mobile").

Lewiston has not issued shares to the public. One-third of Lewiston stock is held by CommNet Cellular, Inc., whose shares are publicly traded, and two-thirds of Lewiston stock is held by Community Cellular Telecommunications, which has not issued shares to the public. Community Service Communications, Inc., the parent of Community Cellular Telecommunications, has issued shares to the public.

Seacoast is a wholly-owned subsidiary of Utilities, Inc. ("Utilities") and is not publicly traded. 78% of Utilities' stock is held by its Chairman and CEO, George Twombly and/or his immediate family members. ROTELCOM, Inc., a subsidiary of Frontier Corporation, whose shares are issued to the public, owns an additional 16% of the outstanding stock of Utilities, with the remaining shares owned by eighteen other stockholders, none of whose shares are issued to the public.

NYNEX Mobile is not publicly traded. It is an indirect wholly owned subsidiary of Bell Atlantic Corporation, a publicly traded corporation that has equity securities in the hands of the public.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Portland Cellular Partnership ("PortCell") hereby opposes the petition for a writ of certiorari filed by Northeast Cellular Telephone Company, L.P. ("Northeast"). This case involves an agency's admitted violation of a preexisting statutory obligation and its correction of that violation while the case was ongoing. The FCC took this corrective action after Congress passed legislation expressly requiring agencies and courts to correct violations of the statute at any time during an ongoing case. Northeast tries to portray the FCC's compliance with this Congressional mandate as somehow being impermissibly retroactive. This issue is not even colorably presented here. The FCC's action was compelled by preexisting law, as well as by the new legislation. Clearly, when

Congress requires agencies to comply with preexisting law in pending cases, it is not acting retroactively.

OPINIONS BELOW

PortCell appends hereto two additional, earlier opinions of the FCC that were omitted from the Petitioner's Appendix: *Portland Cellular Partnership,* 9 F.C.C.R. 3291 (1994) (PortCell App. 1a) and *Portland Cellular Partnership,* 8 F.C.C.R. 4146 (1993) (PortCell App. 9a). These decisions were reversed by the Commission in the decision under review.

STATEMENT OF THE CASE

This case stems from the FCC's violation of the 1980 Paperwork Reduction Act ("PRA").[1] That Act required Office of Management and Budget ("OMB") clearance of certain rules requiring the collection or submission of information to the government. The Public Protection Provision of the statute made such rules unenforceable if they were uncleared by prohibiting the imposition of penalties for not complying with an uncleared rule. That provision stated:

> *Notwithstanding any other provision of law,* no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request . . . does not display a current control number assigned by [OMB].

44 U.S.C. § 3512 (1980) (emphasis added).

In 1986, the FCC promulgated a financial filing rule without submitting it to OMB for review and obtaining the required control number, thus violating the PRA. The rule was, there-

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[1] 44 U.S.C. § 3501 *et seq.* (1980).

fore, unenforceable as a threshold matter.[2] Later that year, PortCell made a filing under this rule, believing it was subject to the rule, not realizing the FCC had not complied with the PRA. Initially, the FCC found PortCell had satisfied the rule. Later, the FCC changed its mind and found the filing deficient, but nevertheless waived the rule and granted PortCell the Portland, Maine cellular license. PortCell proceeded to finance and construct the system, which went on the air in 1987. In 1990, however, the court of appeals vacated and remanded the FCC's waiver decision for a new decision. The PRA violation had still not been discovered.

In 1991, after the remand, the FCC refused to re-waive the rule, rescinded PortCell's license, and denied its application. This action constituted a penalty prohibited by the Public Protection Provision, further violating the PRA. While the case remained pending on reconsideration and appeal,[3] PortCell discovered the FCC's failure to comply with the PRA and sought reinstatement based on the "[n]otwithstanding any other provision of law . . . [no] penalty" language in the Public Protection Provision.[4]

From 1992 through 1995, the FCC refused to consider whether it had violated the PRA. At first, it claimed it had no power to consider the claim, based on the thirty-day limitation on petitions for reconsideration in 47 U.S.C. § 405(a), completely ignoring the Public Protection Provision's "[n]otwithstanding any other provision of law" override clause. (PortCell App. 11a n.4.) Later, the Commission recognized that

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2 *See Dole v. United Steelworkers*, 494 U.S. 26, 40 (1990).

3 PortCell timely appealed the denial to the D.C. Circuit, but its appeal was held in abeyance because a timely petition for reconsideration was also filed by another party.

4 PortCell's reinstatement request was filed after the normal 30-day limit for filing petitions for reconsideration, but while a timely petition for reconsideration was pending.

it did have the discretion to review its noncompliance with preexisting law, but still refused to consider PortCell's PRA contentions because of the late stage of the proceeding. (PortCell App. 3a-6a.) Again, the FCC ignored the PRA's sweeping override of all other laws.

In 1995, the case was still ongoing at the FCC, and thus there had been no opportunity for judicial review of the agency's refusal to address its PRA noncompliance. In that year, Congress recodified the entire PRA and left unchanged the "[n]otwithstanding . . . [no] penalty" protections in the Public Protection Provision. As part of this rewrite, Congress made explicit what was already implicit in this provision—that complete protection was available "at any time" while a case remained ongoing.

PortCell brought this legislative revision to the FCC's attention and sought relief yet again. Only then did the agency finally agree that it was compelled to address the PRA issue. In late 1996, it admitted that its rule had not been cleared and that the license denial violated the statute. It prospectively remedied the penalty it had imposed on PortCell by reinstating PortCell's application and granting it the license. (Pet. App. 24a.)

In January 1998, the court of appeals unanimously affirmed, and in March it denied rehearing and *en banc* review. (Pet. App. 1a, 20a, 22a.) The court found that the FCC's address of the PRA (pursuant to the amendment) in no way interfered with its previous remand. The court also found that the "[n]otwithstanding any other provision of law" language in both the earlier and new PRA trumped any obstacles to the FCC's address of the matter. Finally, the court found that the amendment did not operate retroactively because it merely directed agencies to review their violations of the preexisting law in the course of ongoing litigation.

REASONS FOR NOT GRANTING THE WRIT

I. THIS CASE DOES NOT PRESENT THE ISSUES FRAMED IN NORTHEAST'S PETITION

Northeast does *not* here take issue with the FCC's and the court of appeals' determination that the penalty imposed on PortCell by the FCC violated preexisting law.[5] It only challenges the FCC's *compliance* with that law. At bottom, Northeast would have this Court force the FCC to ignore its acknowledged and clear-cut violation of preexisting law, which nullifies the rule in question.

To this end, Northeast frames two issues generally relating to whether the 1995 legislation, as applied here, violates the separation of powers doctrine or is impermissibly retroactive. This case presents neither issue. Tellingly, Northeast raised neither of these questions when it sought *en banc* rehearing by the D.C. Circuit. There, it presented only a fact-bound, non-constitutional issue as being the most important issue raised by the case. In its effort to invent a constitutional issue for this Court to review, Northeast ignores the fact that the preexisting PRA compelled the same outcome.

A. Separation of Powers

The Petitioner's first question, in essence, is whether the court of appeals' remand to the FCC for a new decision[6] is a "final" judgment, which cannot be affected by subsequent legislation under the separation of powers doctrine. The court of appeals, the best judge of the scope of its prior decision, held

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[5] Under Sup. Ct. R. 14.1(a), only those issues set forth in the petition will be considered.

[6] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

that its previous vacation of the FCC's waiver of the financial rule "did not purport to resolve" whether that rule was valid under the PRA, "because no party . . . raised" the issue, and was in no sense a final judgment in the case. (Pet. App. 11a.)

Northeast nevertheless argues that the circuit court's remand decision became final under the definition of finality contained in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which it states is, in turn, derived from *Griffith v. Kentucky*, 479 U.S. 314 (1987). The only appearance in *Plaut* of *Griffith*, however, is in the introductory section of the case, where it is cited for the unremarkable proposition that a judgment dismissing a case as time-barred becomes final when the time for appeal and certiorari has passed. 514 U.S. at 214. Simply put, finality was not an issue in *Plaut*, because the dismissal of the prior lawsuit there was incontestably final. More to the point, *Plaut* did not even touch on the finality of a remand decision.

This Court has, however, recognized that a remand by definition is not "final," whether or not it is challenged, because it leads to further proceedings below, which are in turn subject to further appellate review. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 374 (1939); *accord United States v. U.S. Smelting & Mining Co.*, 339 U.S. 186, 198 (1950). This Court has made clear that after a judicial remand—and even after denial of certiorari concerning the remand order—subsequent judicial review of the action on remand may revisit issues previously decided by the court's remand order. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 & n.6 (1968). Accordingly, the vacation and remand of an FCC decision is in no way a final judgment, because it necessarily anticipates a further decision on remand, which is independently subject to further judicial review.

Any FCC action after remand is constitutionally required to comport with the laws of the United States, and its compliance

is subject to review by the courts, which must in turn "'decide according to existing laws.'" *Plaut,* 514 U.S. at 227 (quoting *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)). A court of appeals remand does not require the agency to disregard the laws of the United States that were not the subject of the remand, whether they are preexisting laws or subsequently enacted. And Congress does not intrude on the realm of the courts when it enacts legislation requiring agencies to respect the preexisting law in cases that remain nonfinal, including those on remand.[7]

B. Retroactivity

The second question presented in Northeast's petition involves retroactivity. In essence, Northeast questions whether the effect of the 1995 PRA amendments here was impermissibly retroactive. Northeast, however, ignores the preexisting statute, which was outcome-determinative. The Public Protection Provision already barred the FCC from penalizing PortCell when it denied the application in 1991. The FCC and the court of appeals held that the FCC's denial of the PortCell application violated that preexisting law.

The 1980 PRA required agencies to obtain OMB clearance and display a control number before they may compel compliance with a rule such as the financial regulation at issue here. If an agency did not comply with this requirement, the Public

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[7] Northeast attempts to create a nonexistent circuit conflict on the finality of a remand for separation of powers purposes, citing *United States v. Vazquez-Rivera,* 135 F.3d 172 (1st Cir. 1998). That case actually confirms that a remand by the court of appeals is not a final judgment in a case, because the court held its remand was final with respect to the legal issue addressed therein, but not as to the entire case. The court's discussion of the effect of subsequent legislative actions on the issue that was the subject of the remand was based on the fact that applying that legislation would have imposed a criminal sentence *ex post facto*; it was also dictum, since the court reached the same conclusion on other grounds.

Protection Provision specifically provided that "no person shall be subject to any penalty" for failure to satisfy the rule, "[n]otwithstanding any other provision of law." 44 U.S.C. § 3512 (1980). This provision of preexisting law is what rendered the FCC's denial of the PortCell application unlawful. Northeast does not contest this determination.

Thus, the case boils down to the narrow issue of when PortCell was entitled to raise the PRA violation as a defense. This is answered by the same override provision in the preexisting law. The denial of PortCell's license and the consequent grant of the license to Northeast were directly contrary to an Act of Congress that was in effect years before the applications were filed. The correction of this legal error was compelled by existing law. Any procedural bars to raising this defense, such as 47 U.S.C. §§ 402(h) and 405(a),[8] were overridden by the "[n]otwithstanding any other provision of law" language in § 3512. Indeed, the court of appeals relied on this specific language in determining that such statutory obstacles were overridden. (Pet. App. 9a.) Northeast completely ignores this language and its plain meaning.

In the absence of such procedural obstacles, the FCC was obviously obligated to comply with the preexisting law, which barred it from penalizing PortCell based on the FCC's prior clear-cut violation of the statute. If the FCC had not corrected its own error, its denial of the application would have been subject to reversal on appeal for being "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Given that the preexisting law dictated the result here, there is clearly no retroactivity issue.

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[8] Northeast also presents argument concerning 47 U.S.C. § 402(j). This issue was never raised or addressed below and is, accordingly, not properly before this Court.

Northeast nevertheless claims that the new statute is somehow retroactive, never confronting the fact that the new statute does nothing that was not already covered by the preexisting law. The "[n]otwithstanding . . . [no] penalty" provision is carried over and recodified as § 3512(a), with minor changes not at issue here.[9] The 1995 amendments added new § 3512(b), which states:

> The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.[10]

As discussed above, PortCell was fully entitled to no penalty protection notwithstanding any other law under the preexisting law, and actively pursued it.[11] The 1995 amendment resulted in no substantive or procedural change, much less a retroactive one.

Congress made clear when it enacted the 1995 law that it was merely codifying more clearly what was already the law. Just before the House unanimously passed the statute, Rep. Crapo, the author of § 3512(b), said it was meant to—

> *end any confusion which may exist in the courts and Federal agencies about how section 3512 was originally intended to work . . . .*
>
> [T]he amendments made to section 3512 are intended to clarify that a penalty imposed by a Federal

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[9] 44 U.S.C. § 3512(a), as amended by Pub. L. No. 104-13, § 2, 109 Stat. 181 (1995).

[10] 44 U.S.C. § 3512(b), as added by Pub. L. No. 104-13, § 2, 109 Stat. 181 (1995).

[11] Northeast misstates that PortCell "waived" its PRA claim. PortCell never waived its PRA claim, and neither the court of appeals nor the FCC so held.

> agency based on failure to comply with an information request that does not bear on [sic] OMB control number is not enforceable, and *had always provided the public with the right to petition the agencies or courts for complete relief at any time during the agency or court review process to eliminate the effects of any penalty.*

141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995) (emphasis added). Similarly, the House Report on the 1995 legislation states:

> The intended scope, purposes, and requirements of section 3512's current provisions on public enforcement of the Act's information collection clearance requirements are *unchanged.* The section is amended, however, for purposes of consistency and clarity . . . .[12]

Thus, the only effect of the 1995 statute here is that it made explicit what was always implicit in the Paperwork Reduction Act—that the statutory bar on imposing such penalties overrides any legal obstacle to raising the PRA defense in a case that remains pending. The new statute's unambiguous language gave the FCC no opportunity to dodge its responsibility, but it ultimately changed nothing regarding the validity *vel non* of the FCC's denial of the PortCell application.

Even if the 1995 amendment was necessary to the result reached here, there would still be no retroactivity. When Congress requires agencies to comply with preexisting law in pending cases, it is not acting retroactively. As the court of appeals put it:

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[12] H.R. Rep. No. 104-37, at 53 (1995), *reprinted in* 1995 U.S.C.C.A.N. 164, 216 (emphasis added).

> Because § 3512(b) governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.

(Pet. App. 10a.)

Congress fully intended the new statute's protection to be available in pending cases. As this Court has observed, "in determining a statute's temporal reach generally, our normal rules of construction apply." *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997). Both the plain words of the new provision, § 3512(b), and the legislative history accompanying it, support its application to pending cases.

Congress intended complete relief to be available in pending cases as of the effective date of the amendment (October 1, 1995). The government has been barred from imposing such penalties for years by the preexisting Public Protection Provision, and the new language expressly makes the defense available "at any time during the agency administrative process." There is no language even arguably excluding pending cases.

In fact, the drafters specifically stated that this new language applies to pending cases, as the following colloquy between the sponsor of § 3512(b) and the House Conference Manager shows:

> **Mr. Crapo**. I would like to ask, is it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?
>
> **Mr. Clinger**. Mr. Speaker, the gentleman is absolutely correct. As of October 1, 1995, the defense provided in

> section 3512 is available at any time in an ongoing dispute.

141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995).

Applying the PRA amendment here is in keeping with the broad public protection purpose of the previous and amended PRA. *Not* applying it to a pending case would undermine that purpose. The preexisting Public Protection Provision was meant to ensure that agencies would not be able to enforce paperwork requirements not complying with the PRA against the public to their detriment, "[n]otwithstanding any other provision of law." When this statute was enacted in 1980, the legislative history made clear that Congress intended that the public would not have to comply with "bootleg" requirements—they could "ignore" them without fear of penalty. *See* S. Rep. No. 96-930, at 17, 52 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241, 6257, 6292. The new provisions simply confirm the objectives of the preexisting statute. As Senator Roth, the Senate Manager, put it:

> Since 1980, the act has provided a fundamental protection to every citizen that he or she need not comply with, or respond to, a collection of information if such collection does not display a valid control number given by OMB . . . .
>
> Moreover, in section 3512(b) the conferees made clear that the protections of section 3512 may be raised at any time during the life of the matter. The protections cannot be waived. Failure to raise them at any early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.

141 Cong. Rec. S5274-75 (daily ed. Apr. 6, 1995). Not allowing a PRA defense to be raised and given effect here, in

the face of a clear violation, would thus defeat the objective underlying the 1995 clarifying amendment to the original Public Protection Provision.

Section 3512(b) only operates to protect the public from unlawful government conduct and does not have any application to Northeast. The court below correctly observed (Pet. App. 10a) that the statute was not retroactive:

> By permitting parties to raise the PRA issue "at any time" in ongoing proceedings, the statute . . . simply prevents an agency or court from refusing to consider a PRA argument on the ground that it is untimely.

Here, the FCC applied the statute in a completely prospective manner by granting the PortCell application on a going-forward basis only. It did not retroactively grant the PortCell application or retroactively invalidate Northeast's license award. In *Landgraf v. USI Film Products,* 511 U.S. 244, 273 (1994), this Court observed: "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new statute is not retroactive."

Application of the statute did not interfere with any vested rights, because Northeast's license grant never became final. Even though Northeast knew that its license grant depended on PortCell's asserted rights under the PRA being denied, it repeatedly opposed a stay of its license grant, indicating it was willing to accept the risk of building despite the lack of finality.[13] The fact that Northeast lost its license in the course of that litigation is, thus, not a consequence of retroactive application of the 1995 statute.

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[13] *See, e.g.*, Northeast, Opposition to PortCell Motion for Stay (filed with the FCC on July 7, 1993).

Congress enacted § 3512(b) to make crystal clear the public's right to assert their preexisting right to relief from unlawful penalties if a case is not yet over. A ruling that such relief was unavailable for a prior violation of the existing PRA, now that Congress has confirmed the public's right to this protection, just because the case was pending when the statute took effect, would be inconsistent with the language and goal of both the old and new PRA. Since 1980, Congress has clearly intended agencies and courts to correct unlawful penalties if they have the opportunity. The 1995 amendment reflects Congress's continued "zero tolerance" for PRA violations. Congress expressly intended that this right could be asserted for the first time even in a reviewing court.

II. NORTHEAST'S PETITION CONTAINS MATERIAL MISSTATEMENTS

Northeast so misstates the facts in this case that PortCell feels compelled to put at least a few things straight. Pursuant to Sup. Ct. R. 15.2, we correct some of Northeast's most significant misstatements:

- Northeast knowingly mischaracterizes PortCell as violating the FCC's *ex parte* rules in an effort to get the 1995 PRA passed. (Petition at 8.) The FCC specifically *rejected* this *ex parte* allegation. (Pet. App. 39a-44a.) Northeast is bound by this ruling, which it did not challenge on appeal.

- Northeast falsely claims that during the course of the litigation its investment in its licensed station was "secure" because "PortCell's application . . . was no longer in contention." (Petition at 7.) In fact, Northeast's grant was subject to the outcome of the ongoing litigation over the FCC's denial of the PortCell application. Northeast repeatedly and successfully opposed PortCell's requests for a stay of the Northeast license grant pending the outcome of the PortCell litigation, on the ground that it was ready and

willing to take the risk of building while the case was still being litigated.

- Northeast incorrectly states that PortCell "smuggl[ed]" the amendment to the Public Protection Provision through Congress. (Petition at 2; *see id.* at 8-9.) The amendment was part of a major public Congressional initiative to rewrite the PRA. After being proposed at a hearing, it was introduced on the House floor and accepted by a voice vote, after which it received close scrutiny from the Conference Committee for three months. In fact, the Senate Conference Manager stated on the day of passage that "the topic that captured more time in conference discussion than any other was that of redrafting section 3512 . . . ." 141 Cong. Rec. S5274-75 (daily ed. April 6, 1995) (statement of Sen. Roth). The amendment was also the subject of a colloquy immediately before the final bill passed the House. 141 Cong. Rec. H4376 (daily ed. Apr. 6, 1995).

- Although critical of PortCell's legislative efforts, Northeast never mentions its own clandestine effort to smuggle through "rifle shot" legislation in an attempt to gut the 1995 PRA. In fact, in 1996 it tried in a truly "dark of night" effort to attach an amendment exempting this particular case from the Public Protection Provision of the PRA to a Continuing Resolution dealing with appropriations matters. This effort failed because of substantial opposition in the Senate and the House (including the sponsors of the 1995 PRA).

- Northeast falsely claims, without basis, that "PortCell used NYNEX's considerable clout on Capitol Hill" to get the legislation passed. (Petition at 8.) PortCell is a general

partnership in which affiliates of NYNEX[14] and two small independent Maine telephone companies held equal interests. NYNEX had no involvement in any legislative efforts undertaken on behalf of the partnership when Congress undertook "top to bottom" review of the entire PRA.

- Finally, Northeast claims that it has completely followed FCC regulations while PortCell has not, and thus Northeast has been unfairly treated. (Petition at 29.) First, the rule PortCell allegedly failed to satisfy was unenforceable as a threshold matter, and thus Northeast had no right to the license. Northeast also ignores that PortCell had to stop operating in 1992 based on the same unenforceable rule. Second, there are serious unresolved questions concerning control of Northeast that go to its basic eligibility to hold the license, which were very much in issue until they were rendered moot by the grant to PortCell. Northeast knows full well that a formal evidentiary hearing would likely have been held by the FCC into its wireline qualifications.

[14] Since the enactment of the 1995 PRA, NYNEX has been merged into Bell Atlantic Corporation.

CONCLUSION

For the foregoing reasons, there is no issue worthy of review and Northeast's petition for certiorari should therefore be denied.

Respectfully submitted,

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July 15, 1998

APPENDIX

FCC 94-176
[9 F.C.C.R. 3291]

Before the Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	
	)	
PORTLAND CELLULAR PARTNERSHIP, For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27414-CL-P-152-B-86
	)	
NORTHEAST CELLULAR TELEPHONE COMPANY, L.P., For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27488-CL-P-152-B-86

Released: June 29, 1994
Adopted: June 24, 1994

MEMORANDUM OPINION AND ORDER

By the Commission:

I. INTRODUCTION

1. Before the Commission are two petitions for further reconsideration and a petition for reconsideration of our *Memorandum Opinion and Order* (*MO&O*) in the above-

captioned proceeding, 8 FCC Rcd 4146 (1993). Portland Cellular Partnership (Port Cell) and Community Service Telephone Co. (Community) filed separate petitions for further reconsideration on June 25, 1993 and July 6, 1993 respectively. Both Port Cell and Community request reconsideration of the dismissal of Port Cell's application; Community also requests reconsideration of the denial of its request for a waiver of the cellular cross-interest rule.[1] Oppositions to the petitions have been filed by Northeast Cellular Telephone Company, L.P. (Northeast). In addition, Northeast submitted a letter requesting that the Commission further condition the interim operating authority given to Port Cell in the *MO&O,* to which Port Cell submitted an opposition.[2] For the reasons stated below, we deny Port Cell's petition and dismiss in part and deny in part Community's petition. We also deny Northeast's request to condition further the interim operating authority given to Port Cell.

II. DISCUSSION

2. In our *MO&O*, among other things, we denied a petition for reconsideration of our decision in *Portland Cellular Partnership,* 6 FCC Rcd 2283 (1991), on remand from the D.C. Circuit's decision in *Northeast Cellular Telephone Company, L.P. v. FCC,* 897 F.2d 1164 (D.C. Cir. 1990), in which we dismissed Port Cell's application for failure to meet our financial qualifications rule and affirmed the staff's prior denial of Community's request for a waiver of the cellular cross-interest rule. In the *MO&O* we also dismissed a Petition for Reconsid-

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[1] Section 22.921 prohibits interests of one percent or more in more than one application for a market, and interests of one percent or more in mutually exclusive applications for non-MSA/non-NECMA areas. *See Cellular Radio Lotteries,* 101 FCC 2d 577, 598 (1985).

[2] In addition, Port Cell filed a separate petition for reconsideration of the Commission's decision to grant Northeast's application. That petition will be addressed separately in a future order.

eration and Reinstatement of License, filed by Port Cell, because the petition was filed nearly a year after the 30-day deadline for such petitions as set forth in Section 405 of the Communications Act. 47 USC § 405. In that petition, Port Cell argued that its license must be reinstated because the Commission's financial qualifications rules had not been approved by the Office of Management and Budget as required by the Paperwork Reduction Act.

3. In its petition for further reconsideration of the *MO&O*, Port Cell argues that the Commission had both the jurisdiction and the discretion to consider its Petition for Reconsideration and Reinstatement of License and that its failure to do so was erroneous. According to Port Cell, Section 405 of the Communications Act of 1934 is not an absolute bar to considering untimely petitions for reconsideration. Port Cell argues that once a timely petition for reconsideration has been filed, the Commission has jurisdiction to reconsider its decision on the grounds raised in the timely petition and also has the discretion to reconsider on grounds raised in other pleadings or by the Commission *sua sponte*, citing *Meredith Corp. v. FCC,* 809 F.2d 863 (D.C. Cir. 1987). Port Cell also cites *Central Florida Enterprises, Inc. v. FCC,* 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed,* 441 U.S. 957 (1979), for the proposition that the timely filing of a petition for reconsideration satisfies the jurisdictional requirements of Section 405, tolling the 30-day period for reconsideration of a decision on the Commission's own motion. Other cases cited by Port Cell in support of its petition are *Albertson v. FCC,* 182 F.2d 397 (D.C. Cir. 1950), *Gardner v. FCC,* 530 F.2d 1086 (D.C. Cir. 1976) and *Enterprise Co. v. FCC,* 231 F.2d 708 (D.C. Cir. 1955), *cert. denied,* 351 U.S. 920 (1956). In its opposition, Northeast challenges Port Cell's interpretation of these cases.

4. We agree with Northeast that the cases cited by Port Cell do not require acceptance of Port Cell's untimely petition for reconsideration. For example, in *Meredith Corp. v. FCC,*

supra, the D.C. Circuit held that it had jurisdiction to consider constitutional arguments raised for the first time by an appellant in a supplement to its timely filed petition for reconsideration to the FCC. Here, Port Cell did not file a timely petition for which it could file a supplement. Likewise, *Central Florida Enterprises v. FCC, supra,* is not on point. There, the Court found that the pendency of a timely petition for reconsideration permitted the Commission, *sua sponte,* to clarify its earlier decision. Furthermore, contrary to Port Cell's assertions, the Commission does not have a statutory duty to consider arguments raised in an untimely petition for reconsideration. As Northeast points out, the fact that the Commission *might have* used the pendency before it of a timely petition for reconsideration filed by a party other than Port Cell as a basis for considering on its own motion the arguments belatedly raised by Port Cell does not mean that it had an *obligation* to do so.

5. Similarly, the *Gardner* case, as interpreted by the court in *Reuters Limited v. FCC,* 781 F.2d 946 (D.C. Cir. 1986), does not support Port Cell's argument. In *Reuters,* the court held that the Commission was barred by statute from entertaining a belated petition for reconsideration except where, as in *Gardner,* there were extraordinary circumstances under which the mandatory language of Section 405 did not preclude consideration of an untimely petition because the Commission failed to give required notice of its decision. However, the court made it clear that the holding in *Gardner* was limited to the highly unusual circumstances in that case, including the fact that the Commission failed to give notice to the party of its action. Here, there are no extraordinary circumstances which warrant consideration of Port Cell's belated petition. *Albertson* and *Enterprise* are also inapposite. Neither case requires that the Commission consider late-filed petitions for reconsideration. In *Albertson,* the court held that a party may file for reconsideration of a Commission order denying reconsideration if it does so within the statutory time period. In *Enterprise,* the court held that under the circumstances of that case, the

Commission should have considered new factual developments presented to it during the pendency of a petition for reconsideration where those new facts went to the heart of the factual premise of the Commission's decision and were raised promptly (within three days) of their discovery. Port Cell's grossly untimely presentation of a new legal argument does not fall within these cases.

6. In sum, while we have discretion to consider, on our own motion, whether Port Cell's application should be reinstated because of alleged Paperwork Reduction Act violations, we believe it would be inappropriate to exercise our discretion in favor of considering Port Cell's argument based on the Paperwork Reduction Act. Port Cell's failure to avail itself of this argument when its compliance with our financial qualifications rule was first called into question imposed a particularly heavy burden on the resources of the court, the Commission and the other parties to this proceeding. These resources were consumed litigating the issue of Port Cell's compliance with the financial qualifications rule and the related waiver issue first before the Commission and then before the court in a difficult appeal, and thereafter again before the Commission on remand and in connection with timely filed petitions for reconsideration. This litigation could have been avoided if Port Cell had been diligent in asserting its rights based on the Paperwork Reduction Act.[3] Moreover, we perceive no countervailing

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[3] *Cf. Northwestern Indiana Telephone Co. v. FCC*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990). We note that our decision here differs from other decisions where we have reinstated cellular applications still pending before the Commission on the basis of the fact that the underlying rule had not received approval by the Office of Management and Budget under the Paperwork Reduction Act, even if the applicant had not raised this issue at the earliest possible time. *See Asset Management Corp.*, 6 FCC Rcd 6538 (Mob. Ser. Div. 1991), *Dana Communications, Ltd.*, 7 FCC Rcd 1878 (1992) and *Kent S. Foster*, 7 FCC Rcd 7971 (1992). In none of these cases, however, had the case progressed to a final Commission decision that had been reviewed in court. Indeed, for us to consider the

public interest reason at this juncture to reconsider on our own motion our prior decision in the *MO&O*. Accordingly, we deny Port Cell's petition.

7. In its petition for reconsideration, Community asks the Commission to revisit its decision denying Community a waiver of the cellular cross-interest rule. *See* 47 CFR § 22.921.[4] This matter has been fully considered before and nothing raised by Community supports revisiting that decision now. Accordingly, we deny Community's petition with respect to this issue.

8. Finally, Northeast has requested that we add conditions to Port Cell's interim operating authority consistent with conditions the staff has issued previously to interim cellular operators where there was no permanent licensee or where the permanent licensee was not ready to commence service. According to Northeast, these conditions would require Port Cell to cooperate fully with it to effectuate a smooth transition to the provision of service in the market by Northeast and to cooperate in transferring the Portland cellular customer base to Northeast. Northeast argues that conditioning Port Cell's interim authority as requested would avoid any disruption in service to the public and would ensure a smooth transition of service from Port Cell to Northeast. In its opposition to this request, Port Cell argues that there is no valid reason for imposing conditions on the continued provision of interim

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Paperwork Reduction Act issue now might conflict with the court's instruction in *Northeast Cellular* that "[a]bsent a finding" that certain information "was considered and used in formulating an articulable standard at the time the waiver was granted, the FCC *must disqualify* Port Cell's application." *Northeast Cellular,* 897 F.2d at 1167 (emphasis added).

[4] Community also raises, for the first time, financial qualifications and Paperwork Reduction Act issues. Because it has not shown why it did not raise this issue previously, its petition is dismissed with respect to these issues. *See* 47 CFR § 1.106(c).

service until a licensee has been selected by a decision that has passed final judicial muster. We believe that additional conditions are unnecessary to ensure a smooth transition. In the *MO&O* we stated that Port Cell's interim operating authority would terminate only when Northeast is ready to begin providing service, and that Northeast shall notify Port Cell of its intention to commence service no less than 10 days prior to commencement of service. Therefore, we deny Northeast's request for imposition of additional conditions. To the extent, however, that Port Cell fails to cooperate in the transition, Northeast can bring evidence of this failure to our attention. We would then be prepared to take whatever action necessary to achieve a smooth transition for cellular customers.

III. CONCLUSION

9. Having reviewed the petitions for further reconsideration filed by Port Cell and Community we affirm our decisions in the *MO&O* regarding the applications of Port Cell and Community. Nor are we convinced that further conditions should be imposed on Port Cell's interim operating authority. This concludes our third decision on remand of *Northeast Cellular Telephone Company, L.P. v. FCC,* 897 F.2d 1164 (D.C. Cir. 1990), with respect to Port Cell's and Community's applications.

IV. ORDERING CLAUSES

10. Therefore, for the foregoing reasons, IT IS ORDERED THAT the decisions in *Portland Cellular Partnership,* 8 FCC Rcd 4146 (1993), ARE AFFIRMED to the extent set forth herein.

11. IT IS FURTHER ORDERED THAT the Petition for Further Reconsideration filed by Portland Cellular Partnership IS DENIED.

12. IT IS FURTHER ORDERED THAT the Petition for Further Reconsideration filed by Community Services Telephone Company IS DISMISSED IN PART AND DENIED IN PART.

13. IT IS FURTHER ORDERED THAT the request by Northeast Cellular Telephone Company, L.P. to condition Port Cell's interim operating authority IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
William F. Caton
Acting Secretary

FCC 93-296
[8 F.C.C.R. 4146]

Before the Federal Communications Commission
Washington, D.C. 20554

In re Applications of:	)	
	)	
PORTLAND CELLULAR PARTNERSHIP, For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27414-CL-P-152-B-86
	)	
NORTHEAST CELLULAR TELEPHONE COMPANY, L.P., For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, in Market 152, Portland, Maine	)	File No. 27488-CL-P-152-B-86

Released: June 4, 1993
Adopted: June 4, 1993

MEMORANDUM OPINION AND ORDER

By the Commission:

I. INTRODUCTION

1. Community Service Telephone Co. (Community) has filed a petition for reconsideration of the Commission's decision in *Portland Cellular Partnership,* 6 FCC Rcd 2283

(1991), (hereinafter *Port Cell Remand Order*). Community has also filed an application for review[1] of the Common Carrier Bureau's decision declaring Northeast Cellular Telephone, L.P. (Northeast) the first ranked applicant and tentative selectee for the Portland Maine Block B cellular market. This *Order* will address the arguments raised by Community in its petitions. We will also address two separate petitions to dismiss or deny the application of Northeast filed by Portland Cellular Partnership (Port Cell)[2] and Saco River Cellular, Inc. (Saco River)[3]. Oppositions and responsive pleadings have been filed by the parties to this proceeding. For the reasons set forth below, we affirm the *Port Cell Remand Order* and grant Northeast's

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[1] Community's application for review incorporates its petition for reconsideration and is directly related to review of the decision naming Northeast as the tentative selectee announced in Public Notice 12867, Report No. CL-91-139 (released Apr. 30, 1991). While the naming of an entity as a tentative selectee is not an "action" subject to Commission review under 47 U.S.C. § 305(c) and 47 C.F.R. § 1.15, in order to resolve all pending matters in this complex case, we will address Community's arguments. Moreover, because the arguments in the petition for reconsideration and the application for review are identical, we will refer to both as Community's "petition."

[2] At the time of the grant, Port Cell consisted of Seacoast Cellular, Inc. (Seacoast) (42 percent interest), NYNEX Mobile Communications Company (NYNEX) (48 percent interest) and Community Services Telephone Company (10 percent interest). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

[3] Port Cell also submitted a "Motion for Leave to File Response" to the Consolidated Reply of Northeast and Northeast submitted an opposition to Port Cell's pleading.

application.[4] Community has failed to demonstrate any Commission error upon which relief may be granted.[5]

II. BACKGROUND

2. The application of Seacoast was selected first in the lottery for the Portland, Maine cellular radio market. The application of Seacoast was substituted with the application of Port Cell pursuant to a pre-lottery partial settlement. The Mobile Services Division (MSD) found the substituted application acceptable and granted an authorization to Port Cell.[6] This

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[4] On April 29, 1992, Port Cell filed a Petition for Reconsideration and Reinstatement of License, to which Northeast filed an Opposition. Port Cell filed its reconsideration petition nearly a year after the 30-day deadline for such petitions set forth in Section 405 of the Communications Act. 47 U.S.C. § 405. As we have repeatedly noted, "except where the Commission fails to provide notice of its decision to parties as required by its rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405." *Heritage Cablevision Associates of Dallas, L.P.*, 7 FCC Rcd 4192, 4193 (1992) (subsequent history omitted). *See also id.* at 4194 n.15 for additional case references. Accordingly, we dismiss Port Cell's untimely petition for reconsideration. Additionally, on March 31, 1993, Port Cell filed a letter with the Chairman which raised the same matters raised in its late-filed Petition for Reconsideration. Northeast filed a response to this letter. This letter is simply a supplement to a late-filed petition for reconsideration and is therefore not considered herein.

[5] Section 1.106(d) of the Commission's Rules sets forth the requirements of a petition for reconsideration. While Community has attempted to cite the conclusions which it believes to be erroneous, it has not persuaded us that there is any error in the *Port Cell Remand Order*.

[6] *See Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mobile Serv. Div. 1987). In finding Port Cell qualified, the MSD also denied requests for waiver of Section 22.921 of the Commission's Rules. Seacoast and Community filed waiver requests because common shareholders between them own more than one percent of the stock in each. In their request, Seacoast and Community requested alternative relief that Community's application be dismissed and only Seacoast's application be considered in the lottery. In a letter dated May 27, 1986, the MSD stated that it was in the public interest to include both applications in the lottery and consider the

grant was affirmed by the Commission.[7] Northeast and Saco River appealed the Commission's decision to the United States Court of Appeals for the D.C. Circuit. The Court vacated and remanded the Commission's Order[8] agreeing with the petitioners that the Commission's decision to waive the financial requirements was not consistent with *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*).[9]

3. Accordingly, in the *Port Cell Remand Order*, the Commission vacated its grant and dismissed the Port Cell application; dismissed the application of Seacoast as amended to substitute Port Cell as the applicant; and granted Port Cell interim authority to provide service until the grant of a new construction permit. As the next ranked applicant, Saco River would have become the tentative selectee.[10] However, a review of its application revealed that Saco River proposed a 39 dBu

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requests for waiver after the lottery if Seacoast or Community were selected. *Id.* at 5587. The MSD further stated that if Community's application were selected first it would consider the second-ranked applicant as the tentative selectee in the market, thereby essentially granting the alternative relief sought by the parties. In its *Order* granting Port Cell, the MSD stated that because Community's application was not selected first it did not have to be formally dismissed and that Seacoast's application was properly accepted as the tentative selectee.

The *MSD Order* also found Port Cell financially qualified despite the fact that the letter of credit from NYNEX Credit Company (NCC) failed to contain the terms of the loan commitment and did not make an assessment as to the creditworthiness of Port Cell as required by the Commission's Rules. The MSD determined that NCC fulfilled the Commission's requirements in a subsequent letter.

[7] *Portland Cellular Partnership*, 4 FCC Rcd 2050 (1989).

[8] *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

[9] Port Cell's petition for rehearing was denied on May 9, 1990.

[10] The application of Seacoast Cellular was chosen as the first ranked applicant in the Portland, Maine, lottery followed by Saco River, Community, Northeast, and NYNEX. Seacoast, Community, and NYNEX entered into a pre-lottery settlement agreement.

contour extension into the adjacent Lewiston-Auburn New England County Metropolitan Area (NECMA) that was not *de minimis* and therefore prohibited. Thus, the Saco River application was found defective and was dismissed. Northeast, the next ranked applicant, was announced the tentative selectee for the Portland cellular market in a separate public notice. *See* Public Notice 12867, Report No. CL-91-139 (released Apr. 30, 1991).[11]

III. PLEADINGS; DISCUSSION

A. Pleadings

1. Community's Petition

4. In its application for review and petition for reconsideration, Community makes three main arguments. First, it argues that the Commission erred in not upholding the grant of Port Cell's application. According to Community, the court remanded the Commission's grant to Port Cell on the narrow ground that the Commission failed to articulate adequately both the basis and the standard for granting a waiver of strict compliance with the financial qualifications rules. Community contends that on remand it was incumbent upon the Commission to review the record to determine whether Port Cell was financially qualified.

5. Second, Community maintains that the Commission erred in not allowing it to remain ranked among the lottery winners. In Community's view, the Commission ignored the statement that its voluntary dismissal of its application was

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[11] Community's application was not considered in the lottery results pursuant to the alternative relief granted Seacoast and Community in the May 27, 1986, letter allowing both Seacoast and Community to compete in the lottery and stating that Community would not be considered if selected first. *See* para. 6 *infra*.

conditioned upon the grant of the permit to Port Cell. Indeed, Community states that settlements will be much harder to achieve if the settling parties cannot reasonably escape the settlement when the settlement application is not acceptable to the Commission. It is unfair, Community asserts, to penalize two applicants who properly filed applications, reached a partial settlement encouraged by the Commission, and invested time and resources into building and operating a successful cellular system.

6. Third, Community requests reconsideration of the MSD's earlier denial of its request for a waiver of Section 22.921.[12] Community and Seacoast requested waivers in their applications because they had two common shareholders who owned more than 1 percent of the stock in each.[13] Community states that the purpose of the rule is to prevent the filing of multiple applications by commonly controlled corporations, thus promoting administrative efficiency and minimizing the possibility that any applicant may have a substantial interest in more than one application for a cellular license. However, Community argues, it is not commonly controlled by one or more corporations, and no party will have a substantial interest in more than one applicant for the license. Thus, Community asks the Commission to revisit the MSD's decision and grant its waiver request.

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[12] *See Portland Cellular Partnership*, 2 FCC Rcd 5586 (Mobile Serv. Div. 1986).

[13] Two of the stockholders of Utilities, the parent company of Seacoast, owned more than 1 percent of the stock of Community. Rotelcom, Inc. owned 16.2 percent of Utilities and 6% of the stock of Community and The Estate of Frank Southard owned 1.2 percent of the stock of Utilities and 17.12 percent of the stock of Community. The MSD found that these percentages represented a "substantial level of cross-ownership, that these applications did not demonstrate the existence of special circumstances [,and] that the purpose of Section 22.921 would not be served by the waiver request." *See Portland Cellular Partnership*, 2 FCC Rcd 5586, 5587 (Mobile Serv. Div. 1987). Accordingly, the MSD denied the waiver requests. *Id.*

7. In its opposition to Community's petition for reconsideration, Northeast asserts that most of the arguments presented by Community were addressed in other pleadings in this proceeding.[14] In light of the opinion of the court, Northeast contends that the Commission cannot now find Port Cell financially qualified. It maintains that Community cannot now challenge the 1987 MSD decision which found Community ineligible to participate in the lottery, because it should have asserted this challenge immediately after its request was denied. Northeast further maintains that Community and Seacoast both requested that if the Commission denied the Section 22.921 waiver request, Seacoast's application be allowed to remain on file while Community's application would be dismissed with prejudice. Northeast argues that because Community did not appeal the order at the time, allowing it to do so now, would result in giving both Seacoast and Community a chance in the lottery—the precise result that the Commission sought to prevent by adopting the cross-ownership rule.

2. Northeast; Petitions to Deny

a. Port Cell

8. In its petition against Northeast's application, Port Cell presents three arguments. First, it claims that the engineering exhibits contained in the original application contained numerous defects. For example, six of the seven cells proposed by Northeast for its cellular system contain 39 dBu extensions into adjacent NECMAs, and two cells contain extensions into Rural Service Areas (RSAs). Also, one of the cells proposed 39 dBu

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[14] Northeast refers to "Northeast Motion for Appropriate Procedures Following Remand," filed June 15, 1990; its "Opposition to Memorandum of Portland Cellular Partnership Regarding Commission Action on Remand," filed July 16, 1990, and "Northeast Motion To Strike, and in the Alternative, Response of Northeast Cellular Telephone Company, L.P. To Reply of Portland Cellular Partnership," filed Aug. 23, 1990.

contours that extend into a central NECMA. Port Cell maintains that all of these extensions are in violation of the Commission's rules and precedent, citing *Alltel Cellular Assoc. of the Carolinas,* 61 Rad. Reg. 2d (P&F) 225, 227 & n.10 (Com. Car. Bur. 1986) and *Advanced Mobile Phone Service, Inc.,* 52 Rad. Reg. 2d (P&F) 1593, 1602-03 (Com. Car. Bur. 1983).

9. Second, Port Cell contends that Northeast failed to demonstrate reasonable assurance that the cell sites specified in its application were available. Port Cell claims that some of the sites proposed by Northeast were not available when its application was filed. There is no evidence, Port Cell claims, to suggest that Northeast or its agent contacted the owners of the sites to determine the sites were available. In fact, Port Cell notes that Northeast recently confirmed, in an amendment, that at least three of its originally proposed sites are, in fact, not available. This, Port Cell avers, is in violation of Commission rules and renders Northeast's application defective for lack of site availability.

10. Finally, Port Cell states that Northeast has failed to disclose the real party in interest behind its application. Port Cell expresses doubt that Northeast could have secured financing independently and thus concludes that United States Cellular Corporation (USCC), a subsidiary of Telephone and Data Systems, Inc. (TDS), is the real party in interest behind the application. Port Cell maintains that it is entitled to an evidentiary hearing to determine whether Northeast had reasonable assurance of site availability and whether Northeast is controlled by USCC and TDS.[15]

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[15] The ownership history of Northeast is long and complicated. As explained by Northeast, in September 1983, Pine Tree Technology (PTT) and TDS entered into a Shareholders' Agreement providing for the creation of a joint venture corporation for the purpose of applying to the Commission to construct and operate wireline cellular systems in the Portland and Lewiston-Auburn, Maine, NECMAs. PTT was then the wholly owned

subsidiary of The Pine Tree Telephone and Telegraph Company (Pine Tree Tel and Tel). Almost 95 percent of Pine Tree Tel and Tel's stock was and is owned by Timothy D. Hutchison. The Shareholders' Agreement provided that PTT would hold a 65 percent interest and TDS a 35 percent interest in the joint venture corporation. In 1985, PTT and TDS determined that the cellular applicant would be a limited partnership, with the same ownership percentages. In July 1985, the Articles of Incorporation for Maine State Cellular Telephone Company (Maine State), the proposed general partner corporation for the applicant partnership, were filed with the Maine Secretary of State. In 1986, TDS assigned its rights to acquire its shares to its newly formed and then wholly owned subsidiary, USCC. On March 14, 1986, PTT, USCC, and Maine State entered into the "Certificate and Agreement of Limited Partnership" for Northeast. This agreement has been amended several times. Wireline lotteries for the Portland and Lewiston NECMAs took place in May and November, 1986, and Northeast did not win either lottery.

In 1987, USCC entered into an option agreement to purchase a controlling interest in the non-wireline permittee in the Lewiston, Maine, NECMA. Under the Commission's rules and policies, USCC could not acquire the Lewiston non-wireline interest if it retained an interest in a Lewiston wireline application. Thus, Maine State, PTT, Mr. Hutchison, TDS, and USCC agreed that USCC would withdraw from Northeast, exercise its option to acquire the non-wireline interest in Lewiston and obtain an option to reacquire a minority interest in Northeast at some time in the future. In May 1988, USCC and the controlling partner in the Lewiston non-wireline partnership filed an application for transfer of control which was consummated on October 18, 1988. Between February 1, 1988 and October 8, 1990, TDS and USCC held no ownership interest in Northeast and played no part in its affairs. Prior to this, on October 27, 1987, Mr. Hutchison had purchased PTT from Pine Tree Tel and Tel giving PTT a 99 percent limited partnership interest in Northeast. Maine State continued to hold a 1 percent general partnership interest, with PTT holding a 51 percent interest in Maine State and Mr. Hutchison holding the remaining 49 percent interest personally. On December 20, 1988, in *Northeast Cellular Telephone Company, L.P. v. FCC*, No. 88-1563, U.S. Court of Appeals for the D.C. Circuit summarily affirmed the Commission's decision dismissing Northeast's application for the nonwireline license in the Lewiston NECMA. Thereafter, Northeast had no further possibility of obtaining an interest in the Lewiston NECMA and then could pursue its Portland application. Since USCC had no interest in the non-wireline licensee in Portland, USCC was no longer barred by the Commission's rules and policies from having a minority interest in Northeast. After the Court of Appeals decision vacating the

b. Saco River

11. Saco River maintains that changes in Northeast's ownership make it ineligible for a wireline authorization, under Section 22.902(b) of the Commission's Rules.[16] Saco River argues that the reorganized Northeast is not a common carrier engaged in the business of providing landline telephone service and cannot meet the Commission's common carrier eligibility requirements. Saco River states that Northeast's only claim to connection with a local exchange telephone company providing service in the Portland NECMA is that its majority limited partner is owned by an individual who also owns shares in PTT, a wholly-owned subsidiary of Pine Tree Tel and Tel. According to Saco River, this shareholder relationship does not impute wireline presence in the market to Northeast.[17] In addition,

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Commission's grant of Port Cell's application, USCC and Mr. Hutchison agreed that USCC's subsidiary, USCOC of Portland, Inc. (USCOC), would acquire a 48.51 percent limited partnership interest in Northeast and a 49 percent interest in Maine State.

[16] Section 22.902(b) provides that:

> Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies from Cellular System B in those areas in which they provide such landline service in some portion of the market.

47 C.F.R. § 22.902(b).

[17] For support, Saco River cites *Cellular Communications Systems,* 86 FCC 2d 469, 487-491 (1981), *recon.,* 89 FCC 2d 58 (1982), *further recon.,* 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC,* No. 82-1526 (D.C. Cir. Mar. 3, 1983) (wireline presence needed for eligibility) and *Montgomery Independent Cellular Telephone Co., Inc.,* 2 FCC Rcd 4385 (Mobile Serv. Div. 1987), *recon. denied,* 3 FCC Rcd 396 (Com. Car. Bur. 1988), *review denied,* 4 FCC Rcd 2323 (1989) (84 percent interest in applicant held by entity not authorized to provide public landline telephone service).

Saco River contends that Northeast's proposed cell extension of "over 25 percent" for one cell is not *de minimis* and must be dismissed. Likewise, Saco River asserts that Northeast cannot be allowed now to amend its application to cure the defect.

12. In its consolidated reply, Northeast states that at the time its application was filed in March 1986, all of the extensions proposed in its application were *de minimis* and justified according to the Commission's Rules. Moreover, Northeast contends that even if its extensions are not *de minimis*, the Commission cannot now dismiss its application. It argues that, unlike the application of Saco River, Northeast included in its application a specific statement explaining why it was necessary "to engineer the particular cells such that the 39 dBu contours could not be kept within the SMSA or NECMA," citing *Cellular Applications Filing Procedures: An Update,* 52 Rad. Reg. 2d (P&F) 725, 726 (1982). Northeast concludes that, if the Commission does not accept the engineering explanation, it may only require that the applicant bring the 39 dBu contour back within the MSA or NECMA. Northeast uses its discussion of the Commission's *de minimis* policies to buttress its assertion that it should only be required to bring its contours into compliance should the Commission not accept Northeast's engineering explanation.

13. In addition, Northeast dismisses Port Cell's allegation that USCC is the real party in interest behind its application. At the time its application was filed, Pine Tree Technology was a wholly-owned subsidiary of Pine Tree Tel and Tel. Pine Tree Tel and Tel sold its interest in PTT to Mr. Timothy Hutchison, who now is its sole owner. Mr. Hutchison is also 95 percent shareholder of Pine Tree Tel and Tel. However, the telephone company no longer owns any interest in PTT or Northeast. By virtue of these changes, Saco River argues that Northeast is not a common carrier engaged in the business of providing landline telephone service. Northeast responds that Section 22.902(b) grants licenses to common carriers engaged directly or indi-

rectly in the business of offering public landline message telephone service. There is no requirement, Northeast maintains, that wireline cellular applicants be owned by any commonly controlled telephone company.

14. Finally, Northeast contends that petitioners' allegation that it has not received reasonable assurance for its proposed sites is not correct. To counter petitioners' claim, Northeast submits two sets of "Options to Acquire Easement" (and "Letter of Intent") covering all seven of Northeast's cell sites. Over the past five years, Northeast notes that three of the original cell sites became unavailable and the options for the other cell sites expired. After it was named tentative selectee, Northeast renewed the options for Cells 3, 5, 6, and 7 and obtained new options, at nearby locations, for Cells 1, 2, and 4. Therefore, Northeast urges the Commission to reject this argument.[18]

B. Discussion

1. Community's Petitions

15. Upon review of Community's petitions, we find that Community has failed to demonstrate any Commission error in dismissing Port Cell's application and naming Northeast as the tentative selectee. In remanding the Commission's order

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[18] Subsequent to the filing of pleadings allowed under the Commission's Rules, Port Cell filed an additional pleading challenging Northeast's response in its reply that it had received reasonable assurance for its original Cell 2. Port Cell maintains that the coordinates for that proposed cell is a wetland area unsuitable for use. In its response, Northeast urges the Commission to reject the filing as an abuse of the FCC's processes, because Port Cell could have made this argument earlier in the proceeding. Neither of these additional pleadings is authorized by the Commission's Rules. However, since these pleadings relate to timely raised issues, in order to have a full record upon which to base our decision, we have considered the matters raised in these filings.

granting the application of Port Cell, the court found that the Commission failed to comply with *WAIT Radio* because it did not articulate any standard by which the court could determine the policy underlying the Commission's waiver. The court indicated the type of specific information the Commission should have included in determining whether a waiver was appropriate. As we stated in the *Port Cell Remand Order,* the facts in this case simply do not demonstrate Port Cell's financial qualifications under the Commission's Rules, and its request for a waiver is without justification and therefore must be denied. *See Port Cell Remand Order,* 6 FCC Rcd 2283, 2284 (1991).

16. We also reject Community's argument that it should receive a second opportunity to be awarded the cellular license in the Portland market. Community can only receive a license if its request for a waiver of the cross-interest rule contained in Section 22.921 is granted. The record is clear that Community's application violated Section 22.921 and its contention that it is not under common control with Seacoast, at least for the purposes of our Rules, is simply erroneous. Moreover, Community has shown no facts that would support grant of a waiver. *See* n.12, *supra.* We have consistently applied Section 22.921 and find no justification in this case to depart from those decisions.[19] We affirm the MSD's denial of Community's request for waiver of Section 22.921 and dismiss its application.[20]

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[19] *See, e.g., Progressive Cellular III B-3,* 6 FCC Rcd 7178 (1991), *aff'd,* No. 92-1006 (D.C. Cir. Feb. 2, 1993); *Florida Cellular Mobil Communications Corporation,* 6 FCC Rcd 6910 (1991). Both *Progressive* and *Florida Cellular* filed requests for waivers of Section 22.921. The Commission denied the requests and dismissed the applications.

[20] We note that Section 22.19 provides: "If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal which complies with the Commission's Rules." The alternative proposal provided by Community and Seacoast in

2. Northeast; Petitions to Deny

a. 39 dBu Contour Extensions

17. We now turn to the petitions to dismiss or deny the Northeast application. At the time this application was filed, Commission policy stated that the 39 dBu contours as well as the Cellular Geographic Service Area (CGSA) should generally be kept within borders of the MSA or NECMA. However, the policy provided that minor overlap of 39 dBu contours into another MSA or NECMA would not render an application defective provided an explanation was included to show the contour incursions were necessary.[21] In the *Port Cell Remand Order*, we dismissed Saco River's applications because the proposed 39 dBu contour extension into the adjacent Lewiston-Auburn NECMA was not *de minimis*. Northeast, on the other hand, proposes extensions which are *de minimis* and includes in its application a detailed explanation regarding its 39 dBu contour extensions into neighboring market areas. In reviewing Northeast's application, for the reasons set forth below, we find the extent of the proposed extensions—both as originally proposed and as amended—to be *de minimis* and supported by an adequate engineering explanation. Neither Saco River nor Port Cell has presented any facts which demonstrate otherwise.

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their request for a waiver of Section 22.921 was that Community's application be dismissed if the waiver request is not granted. The MSD essentially acceded to this request. *See Portland Cellular Partnership,* 2 FCC Rcd at 5586-87; *see also,* n.6, *supra.*

[21] *See Cellular Communications Systems,* 89 FCC 2d 58, 87 (1982); *Return of Round IV Cellular Applications,* 103 FCC 2d 171, 172-74 (1986); Public Notice, *Cellular Application Filing Procedures, An Update,* 52 Rad. Reg. 2d (P&F) 725 (Mobile Serv. Div. 1982). Acceptable contour incursions are termed *de minimis* extensions. Contrary to our *dicta* in the *Port Cell Remand Order,* 6 FCC Rcd at 2284, if there is an adequate explanation, *de minimis* contour extensions into *any* MSA, NECMA, or other area were permissible.

18. In its initial application, Northeast proposed the following extensions. Originally, Cell 001 extended beyond the CGSA into the Atlantic Ocean 5 square miles. This constituted only 3.6 percent of the land area of Cell 001 and obviously covered no population areas. The total 39 dBu extension area of Cell 002 initially proposed was 6.9 square miles into the Portsmouth NECMA. This extension constituted only 4.8 percent of Cell 002 and 0.68 percent of the Portsmouth NECMA. This cell extended into an area where there is an irregular NECMA boundary, and did not include a significant area of population. Northeast proposed a 39 dBu contour extension of Cell 003 into the Lewiston NECMA of 5.2 square miles or 2.9 percent of the entire cell area and 1.1 percent of the Lewiston NECMA. Again, the extension included an irregular NECMA boundary and did not appear to cover any significant population centers within the Lewiston NECMA. Likewise, the extension of Cell 004 into the Lewiston market constituted only 2.1 percent of the area of the entire cell and 1.2 percent of the area of the Lewiston NECMA and included an irregular NECMA border and covered no significant population centers. The originally proposed extensions of Cells 005, 006, and 007 were more significant. Northeast initially proposed to extend cell 005 34.9 square miles into the Lewiston NECMA, constituting 8.7 percent of the entire cell and 7.3 percent of the Lewiston NECMA. Cell 006 originally extended 20.9 square miles into the Lewiston NECMA and 20.8 square miles into Maine RSA 3, constituting 20.9 percent of the entire cell, 4.6 percent of the Lewiston NECMA, and 0.85 percent of Maine RSA 3. Originally, Cell 007 extended 6.7 square miles into the Lewiston NECMA which constituted only 2.8 percent of the 39 dBu contour of that cell and 1.4 percent of the Lewiston NECMA. In its initial application, Northeast offered the following explanation for its proposed extensions at Exhibit No. 3:

> The proposed CGSA has no extensions outside of the NECMA. The extensions of the 39 dBu contours of the

base station sites are *de minimis* in that the area of the extensions encompasses 141 square miles which is 13 percent of the total NECMA area and 13 percent of the total CGSA area. The proposed CGSA does not extend into a central MSA as expressly prohibited in Section 22.903(a). The purpose of the extension is to provide coverage within the MSA and not to provide service outside it.

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The irregularly shaped NECMA border and the provision of contiguous highway coverage within the NECMA gives rise to the design proposed here. The area encompassed by the 39 dBu contours of the cells are necessitated by desire to serve area within the Portland ME NECMA. The design proposed here is necessary in order to provide quality service specifically along U.S. Highways 1, 201 and 302; State Highways 35, 125, 117, 26, 100, 9, 196, 125, 24 and 197; and Interstate Highway 95 as well as other routes leading into the NECMA of Portland, ME.

19. We find that the 39 dBu contour extensions proposed by Northeast in its original application were *de minimis* and that its engineering explanation—relying on irregular boundaries and service within the Portland NECMA, particularly highways therein—was acceptable. In addition, the cumulative magnitude of the extensions is not significant in light of the overall facts. The most significant cumulative extension, into the Lewiston NECMA, constituted only 8.7 percent of the area of the Lewiston NECMA. Moreover, these extensions are not contiguous.[22] Thus, Northeast's original application was not defective.

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[22] This is in stark contrast to Saco River's application, which covered 57 percent of the population and 41 percent of the area of the Lewiston NECMA.

20. On May 31, 1991, Northeast filed an amendment with the Commission, which, *inter alia*, modified its original engineering proposal.[23] Because Northeast's application as originally filed was acceptable, this amendment was not an impermissible attempt to correct a defect. Moreover, the amendment filed by Northeast did not contain substantial modifications to its technical proposal. It included only minor site changes necessitated by subsequent developments regarding site availability, and did not increase the proposed CGSA. Thus, Northeast's amendments constituted permissible minor amendments. *See* 47. C.F.R. § 22.23(c). We will, therefore, consider Northeast's application as amended.

21. With respect to the amended contours, Cell 001 contains no contour extensions. With respect to Cell 002, we note that the extension goes 2.8 square miles into the Portsmouth NECMA, and constitutes only 1.7 percent of the area of the entire cell and less than 1 percent of the Portsmouth NECMA. The cell extends into an area where there is an irregular NECMA boundary and does not appear to serve any significant population centers within the Portsmouth NECMA. Northeast has used a directional antenna to minimize the extension area. Cell 003 extends 5.1 miles into the Lewiston NECMA. The extension constitutes only 1.4 percent of the area of the entire cell and only 1 percent of the Lewiston NECMA. Again, there is an irregular NECMA boundary at the extension area and the extension does not appear to cover any significant population centers within the Lewiston NECMA. Within the Portland NECMA, Northeast has used reduced power to minimize the extension area. Cell 004 extends 3.3 miles into the Lewiston NECMA. This extension constitutes 1.2 percent

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[23] Northeast filed an additional amendment on October 25, 1991. This amendment modified only Cell 001 by lowering the proposed tower to meet Federal Aviation Administration requirements. This amendment also corrected the coordinates for the originally proposed location of Cell 002. *See* discussion ¶¶ 26-7, *infra.*

of the area of the entire cell and less than 1 percent of the Lewiston NECMA. The extension area extends into an area where there is an irregular NECMA boundary and does not appear to cover any significant population centers within the Lewiston NECMA. Northeast has used a directional antenna to minimize the extension area. The amended extensions for Cells 002, 003, and 004 are clearly *de minimis* and well justified.

22. The extensions from amended Cells 005, 006, and 007, as with the original contours, are more significant. Nevertheless, we conclude they are de minimis and justified. Cell 005 extends 36.3 square miles into the Lewiston NECMA, which constitutes 9.1 percent of the area covered by the cell. The extension area covers less than 1 percent of the population of the Lewiston NECMA, however, and only 7.6 percent of its land area. Moreover, the NECMA boundary is irregular, the cell serves an area of the Maine Turnpike within the Portland NECMA that is close to the border of the Lewiston NECMA, and Northeast has used a directional antenna to minimize the extension area. Cell 006 extends 46.4 square miles outside the Portland NECMA—25.4 square miles into the Lewiston NECMA and 21 square miles into Maine Rural Service Area (RSA) 3. While this is 23.3 percent of the area of the cell, there is an irregular NECMA boundary and Northeast has used a directional antenna to minimize the extension area. The extension is only 5.3 percent of the area of the Lewiston NECMA and only 4 percent of the area of Maine RSA 3, and does not appear to cover any significant population centers therein. Finally, Cell 007 extends 49.2 square miles into Maine RSA 1. While this is 20.3 percent of the area of the cell, there is an irregular MSA boundary and Northeast has used a directional antenna. The extension covers only 1.3 percent of the area, and 5.2 percent of the population, of Maine RSA 1.

23. In sum, we conclude that each of Northeast's amended contour extensions is also *de minimis* and justified. The Portland NECMA has irregular borders and Northeast has

clearly designed its system to cover the Portland NECMA and not adjacent areas. In addition, the cumulative magnitude of the extensions is not significant in light of the overall facts. The most significant cumulative extension, into the Lewiston NECMA, constitutes only 15 percent of the area, and 7.3 percent of the population, of the Lewiston NECMA. Moreover, these extensions into the Lewiston NECMA are not contiguous. Thus, Northeast's application, as amended, is not defective.

b. Wireline Eligibility

24. We also reject the petitioners' argument that Northeast is not eligible for a wireline license because it is no longer a carrier engaged directly or indirectly in the business of providing public landline message telephone service. Pine Tree Tel and Tel is a wireline telephone operating company with access lines in three telephone exchanges, all of which serve the Portland NECMA. At the time Northeast's application was filed, PTT was a wholly owned subsidiary of Pine Tree Tel and Tel. While Saco River admits that through second-tier ownership by Pine Tree Tel and Tel, Northeast was eligible to apply for the wireline cellular system in Portland, it maintains that the subsequent sale of PTT to Timothy Hutchison changes the status of Northeast as a carrier.

25. Section 22.902(b) of the Rules states that "[c]ommon carriers engaged directly or indirectly in the business of affording public landline message service will be assigned frequencies from Cell System B in those areas in which they provide such landline service in some portion of the cellular market . . ." 47 C.F.R. § 22.902(b). The net changes in ownership of Hutchison, PTT, Pine Tree Tel and Tel, and Northeast are of no legal significance under the rules because there has been no cognizable shift in control. On the face of the application, Hutchison remains in control of PTT, Pine Tree Tel and Tel, and Northeast. The question of whether an applicant that is controlled by an individual who also controls a telephone

company is an eligible wireline carrier is a case of first impression. The cases cited by Saco River do not present factual situations similar to the one at issue here. We conclude that an applicant is eligible in this situation because the individual (here, Mr. Hutchison) can, through his control of the telephone company, be reasonably deemed to be the repository of the expertise and experience of the telephone company that underlies the wireline set-aside. The general partner of the applicant is a subsidiary of a landline company. By definition of the Rule, the applicant is indirectly in the business of affording public landline message service. They are in control of the eligible carrier. Indeed, Saco River's argument, if accepted, would lead to the conclusion that the cellular subsidiaries of the Bell Regional Holding Companies are ineligible to be wireline licensees, contrary to the Commission's clear intent.

c. Real Party in Interest

26. In addition, we find Port Cell's allegations that either USCC or TDS controls Northeast to be unsupported. Neither of the two factual assertions of Port Cell—that USCC owns a 48.51 percent limited partnership interest and that Northeast's finances are available only through guarantees of USCC or TDS—raises a *prima facie* case that USCC or TDS is in control of Northeast. *WWOR-TV, Inc.*, 6 FCC Rcd 193 (1990); *Contel Corporation*, 6 FCC Rcd 1003 (1991). Accordingly, no evidentiary hearing is required under 47 U.S.C. § 309(d). *See also Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988). Moreover, even if a *prima facie* case had been presented, Northeast's response makes it clear that no substantial and material questions of fact exist on this issue. *See* 47 U.S.C. § 309(d); *Astroline*.[24]

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[24] In response to a letter from the Deputy Chief, Mobile Services Division, to Alan Naftalin, counsel to Northeast, (dated Feb. 7, 1992), Northeast provided an affidavit and other detailed materials showing that Mr. Hutchison has always been and remains in control of Northeast, distinguish-

d. Site Availability

27. Section 22.15(a)(1) of the Rules requires that "[a]pplications for fixed stations shall list the proposed antenna sites. The applicant shall have obtained reasonable assurance that it can use the site." The *Revision and Update of Part 22 of the Public Mobile Radio Service Rules, Report and Order,* 95 FCC 2d 769 (1983), stated that at the time an application is filed the applicant must determine that there is space available on an existing building or tower, or, if a new structure is to be built, that the property is available for such use and that it is reasonable to anticipate that it may use this space. Northeast has filed options for all its cell sites dated prior to the date of its application. Northeast explains that the coordinates of its proposed Cell 002 in its application as originally filed were 43 degrees 46' 03" North Latitude, 70 degrees 33' 13" West Longitude and that it had an Option to Acquire Easement between Kenneth Smith and USCC. The actual location of the Smith property was 43 degrees 46' 20" North Latitude, 70 degrees 32' 53" West Longitude, a miscalculation by Northeast's former consulting engineer. Because it was unable to renew the option on the Smith property in 1991, Northeast relocated Cell 002 to a nearby location.

28. On the basis of the record, we are persuaded that, when Northeast filed its application, it had received reasonable assurance of the site availability for its Cell 002, but that, through minor error, the coordinates noted in its application were incorrect. In addition, as explained by Northeast, three of the original cell sites, for Cells 001, 002, and 004, became

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ing the instant proceeding from the La Star Cellular Telephone Company proceeding, on which Port Cell in part relies, where the majority partner took no steps to maintain control. *See La Star Cellular Telephone Company,* 6 FCC Rcd 6860 (I.D. 1991), *aff'd,* 7 FCC Rcd 3762 (1992). We are satisfied that Mr. Hutchison has taken sufficient steps in his dealings with USCC and TDS to demonstrate his control.

unavailable and the options for the other cell sites expired.[25] Thus, at the time it filed its application, Northeast had reasonable assurance that its proposed sites were available and its application was not defective. In addition, since no substantial and material question of fact remains on this issue, an evidentiary hearing is not warranted. *See* 47 U.S.C. § 309(d); *Astroline.*

IV. CONCLUSION

29. Having reviewed the petition for reconsideration, the application for review, and petitions to dismiss or deny the application of Northeast, we affirm our decision in *Portland Cellular Partnership,* 6 FCC Rcd 2283 (1991), and find that Northeast Cellular Telephone Company, L.P. is financially, legally, technically, and otherwise qualified to become a Commission licensee. Petitioners have presented no basis for overturning our conclusions in the *Port Cell Remand Order.* We will, however, modify that Order to terminate Port Cell's interim operating authority only when Northeast is ready to begin providing service. We believe that this approach will best serve the public interest because it will prevent any interruption of service on the wireline frequency block in the Portland NECMA. To facilitate the transition, Northeast shall notify Port Cell of its intention to commence service no less than 10 days prior to commencement of such service.

V. ORDERING CLAUSES

30. Therefore, for the foregoing reasons, IT IS ORDERED THAT the application of Northeast Cellular Telephone Company, L.P. (File No. 27488-CL-P-152-B-86) IS GRANTED.

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[25] Following its designation as tentative selectee, Northeast renewed options for Cells 003, 005, 006, and 007 and obtained new options, at nearby locations, for Cells 001, 002, and 004.

Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to any interference protection in any areas outside the Portland, Maine, New England County Metropolitan Area and is further conditioned upon Northeast's coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in those areas.

31. IT IS FURTHER ORDERED THAT the Application for Review and Petition for Reconsideration filed by Community Services Telephone Company ARE DENIED.

32. IT IS FURTHER ORDERED THAT the Petition for Reconsideration and Reinstatement of License filed by Portland Cellular Partnership IS DISMISSED.

33. IT IS FURTHER ORDERED THAT the Petitions to Dismiss or Deny filed by Portland Cellular Partnership and Saco River Cellular, Inc., ARE DENIED.

34. IT IS FURTHER ORDERED THAT the application filed by Community Service Telephone Co. (File No. 27414-CL-P-152-B-86) IS DISMISSED.

35. IT IS FURTHER ORDERED THAT Portland Cellular Partnership is granted interim operating authority to operate the Portland, Maine, wireline cellular system until Northeast Cellular Telephone Company, L.P. commences service.

FEDERAL COMMUNICATIONS COMMISSION
Donna R. Searcy
Secretary